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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JOSEPH ALFRED RUNNER,  
  
Defendant and Appellant.

C061423  
  
(Super. Ct. No.  
08F09366)

In a negotiated plea agreement, defendant Joseph Alfred Runner pled no contest to felony driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and admitted having been convicted three times for the same offense within the past 10 years (Veh. Code, § 23152, subd. (b)) in exchange for dismissal of all remaining charges against him, no immediate state prison time, and 270 days in the county jail. The court suspended imposition of sentence, placed defendant on five years of formal probation, and ordered him to serve 270 days in the county jail consecutive to the time he was serving at the time of sentencing.

On appeal, defendant contends the trial court violated the terms of his plea agreement when it made the 270-day county jail term consecutive. We will affirm the judgment.

## **FACTUAL AND PROCEDURAL HISTORY**

A detailed recitation of the facts underlying defendant's conviction is not necessary to the disposition of this appeal. The relevant facts and procedure are briefly summarized as follows:

During a traffic stop on October 30, 2008, police detected the smell of alcohol on defendant's breath. Tests taken at the scene revealed defendant had a blood alcohol content of .171 percent. Another test taken at the jail revealed a blood alcohol content of .15 percent. A records check showed defendant had three prior convictions for driving under the influence in the past seven years, and that his driver's license had been suspended.

Defendant was charged by felony complaint with driving under the influence (Veh. Code, § 23152, subd. (a)—count one), driving a vehicle with a blood alcohol content greater than .08 percent (Veh. Code, § 23152, subd. (b)—count two), and driving with a suspended license (Veh. Code, § 14601.2, subd. (a)—count three). The complaint alleged that as to counts one and two, defendant had three convictions for driving with a blood alcohol content greater than .08 percent within the last 10 years (Veh. Code, § 23152, subd. (b)), and as to count two, defendant drove with a blood alcohol content greater than .15 percent (Veh. Code, § 23578). The complaint further alleged that as to count three, defendant had three convictions of driving on a suspended license within the last five years. (Veh. Code, §§ 14601.1, subd. (a), 14601.2, subd. (a).)

Defendant entered a negotiated plea of no contest to count one and admitted the three prior driving under the influence convictions in exchange for dismissal of the remaining charges in the complaint and an agreement that he would serve no immediate state prison time, but would serve 270 days in the county jail. At the time of entry of the plea, the court noted that defendant was on probation or parole for another criminal offense and explained that "probation or parole could be revoked because of the plea, but the agreement is these 270 days will cover any Sacramento County violation of probation that might arise because of the plea provided there's not a suspended state prison sentence." When the court asked defendant if he understood that, defendant responded, "Yes, your Honor."

At sentencing, the court granted defendant formal probation and, without objection, ordered him to "serve 270 days in the county jail -- credit for time served, 2 days -- consecutive to the time you are now serving." At the time of sentencing, defendant was serving time in the county jail on case No. 08T00980.

Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **I**

Defendant claims the court violated the terms of the plea agreement because it ordered him to serve the 270 days consecutive "to the time he was serving on a probation violation."

The People urge that the record is ambiguous regarding why defendant was in custody at the time he was sentenced on the current offense. The People are correct.

"We must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed." (*People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Defendant has not met his burden.

Here, the probation report states "defendant was arrested for a violation of 23152(b) V.C. which resulted in a conviction on 8/29/08 in Docket #08T00980," and that the court ordered defendant to serve "180 days County Jail plus 115 days County Jail" in that case. The report states further that defendant began serving time in case No. 08T00980 on December 5, 2008, with a "projected release date" of March 13, 2009. Nothing in the record demonstrates that defendant's conviction or the related jail term in case No. 08T00980 arose out of a violation of probation resulting from the current offense. Indeed, the record suggests otherwise. Case No. 08T00980 arose out of an arrest on January 25, 2008, and a subsequent conviction on August 29, 2008, all prior to defendant's arrest for the current offense on October 30, 2008, and having nothing to do with a violation of probation, as defendant suggests.

Based on those facts, defendant has not met his burden to demonstrate error and we therefore reject his claim on that basis.

## II

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (Mar. 16, 2010, C056510) \_\_\_ Cal.App.4th \_\_\_, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(2), (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served two days of presentence custody, is entitled to two days of conduct credits, for a total of four days of presentence credits to be applied against the 270-day county jail term ordered by the trial court.

### DISPOSITION

The judgment is affirmed. The trial court is directed to apply an additional four days of presentence custody credits to defendant's sentence.

We concur: \_\_\_\_\_ RAYE, Acting P. J.

\_\_\_\_\_ BUTZ, J.

\_\_\_\_\_ CANTIL-SAKAUYE, J.